

November 4, 1997
L-97-46

TO : Catherine C. Cook
General Counsel

FROM : Steven A. Bartholow
Deputy General Counsel

SUBJECT : Recovery of Plaintiff's Attorney Fees from 12(o) Lien

In a recent personal injury suit in the Cook County Circuit Court, attorneys for plaintiff argued that as the Board would derive a benefit from recovery of sickness insurance benefits paid to their client, a portion of the sickness insurance benefits recovered under section 12(o) of the Railroad Unemployment Insurance Act should be offset by attorney's fees pursuant to the "common fund" doctrine evolved under Illinois state law. An Assistant United States Attorney represented the Board in a hearing on the matter of the Board's lien before the Illinois Circuit Court. At the hearing, the judge strongly indicated his preference that the Board reach a settlement with plaintiff. Afterward, the Assistant U.S. Attorney questioned whether the difficulty of enforcing the Board's lien in the Illinois Circuit Court could successfully be avoided by removing the issue to the United States District Court, in light of the June 3, 1997, decision of the United States Court of Appeals for the Seventh Circuit in Blackburn v. Sundstrand Corporation, 115 F. 3d 493 (7th Cir. 1997). In that case the Court rejected removal of an Illinois tort suit to District Court, finding that attorneys' fee awards under the common fund doctrine was not preempted by the Employee Retirement Income Security Act (ERISA). For the reasons set forth below, it is my opinion that the Blackburn decision would not control the outcome with respect to liens asserted under section 12(o).

I. Attorney fees payable under the "common fund" theory of common law.

A longstanding rule of common law allows a court exercising equitable jurisdiction to order an allowance of attorney's fees to one who at his own expense wins a suit which preserves, protects, increases, or otherwise creates a fund in which others share. Allowance of Attorney's Fees Against Property or Fund Increased or Protected by Attorney's Services, 49 A.L.R. 1149, 1150 (1927); supplemented in 107 A.L.R. 749, 750 (1937). The rule is supported by the notion that the person who has taken the risks and costs of litigation should not pay the expenses alone, while others share in the benefits. 49 AL.R. at 1153, 107 A.L.R. at 750. The party to be charged must receive more than an incidental benefit, and there is authority that they must not have chosen

counsel of their own. 107 A.L.R. 753 and 752.

The classic case for application of the doctrine would be where one beneficiary of an estate wins a suit which increases the shares of fellow beneficiaries, e.g. Wallace v. Fiske, 80 F. 2d 897 (8th Cir., 1935). However, venturing into the landscape of statutory benefits such as the RUIA renders claims for attorney's fees less certain. In particular, an Illinois Appellate Court held that where an employer had paid compensation benefits under the Illinois workmen's compensation statute, the employer was not required to contribute a share of the employee's attorneys fees when the injured employee obtained a recovery from a third party tortfeasor. The employer thus received full reimbursement for benefits, while the employee paid his attorney's fees from the remainder of the settlement. Manion v. Chicago, Rock Island & Pacific RR, 119 N.E. 2d 498 (Ill. App., 1954). The Illinois statute was later specifically amended to provide that the employer share attorney fees. Reno v. Maryland Casualty Co., 188 N.E. 2d. 657 (Ill., 1963).

On occasion, attorneys for sickness insurance beneficiaries have claimed that the Board's reimbursement of sickness benefits paid to the employee should be reduced by a share of the attorney's fee under the common fund theory, thereby increasing the amount of damages which remain in the employee's hands. In the case of Lewis v. Railroad Retirement Board, 54 So. 2d 777 (Ala., 1951), the Alabama Supreme Court rejected the claimant's argument that a portion of the lien amount otherwise due the Board under section 12(o) should be offset for a share of attorneys' fees pursuant to Alabama decisions applying the common fund doctrine. The court found:

The suit brought by complainant against the Louisville & Nashville Railroad Company was not in any sense a class suit or brought for the benefit of others. The complainant sought only to establish his own rights. The incidental benefit resulting to the Railroad Retirement Board is not a basis for charging the Railroad Retirement Board with the creation of a fund for its benefit. [54 So. 2d at 782.]

Faced with a like claim for attorneys fees, the United States Court of Appeals for the Third Circuit also concluded in Richter v. United States, 296 F. 2d 509, (3rd Cir., 1961), 511-512:

The plaintiffs say * * * that, even though the act does not provide for an attorney's fee, they should be allowed to recover one either under Pennsylvania law or general federal equity principles. * * *

We find no basis for taking any such liberty with the statute. What we are in effect asked to do is to write a provision which is not there. * * * There is nothing in the legislative history to which we are cited that says anything for or against attorney's fees in this situation. Congress when it desires to make provision for attorney's fees knows perfectly well how to do so, as it has in the Federal Employees' Compensation Act and an abundance of other situations. It has not done so here and we do not think it a proper subject for court action. [Footnotes omitted].

Such reported case law as exists thus supports the Board's traditional position that the sickness insurance beneficiary, rather than the agency, should pay any attorney fees in connection with recovery of damages for the underlying infirmity. See Legal Opinion L-58-82 (citing Lewis as a basis for declining to deduct attorney's fees), and Craig v. Jo B. Gardner, Inc., 586 S.W.2d 316, 327, (Mo., 1979), (attorney had no standing to claim that recovery of the Board's full lien under 12(o) without concurrent liability for attorney's fees constituted a "taking" without constitutional due process, where his fee was paid in full by the injured beneficiary.)

II. Removal of state court actions to Federal district court.

On occasion, it has been the Board's practice to request the appropriate United States Attorney's office to remove the sickness beneficiary's tort suit to Federal district court to enforce the claim to a portion of the plaintiff's damages under section 12(o). Removal of state court cases is authorized by 28 U.S.C. 1441.¹ Section 1441(a) provides that a case may be removed by the defendant to Federal court where the Federal court would have had original jurisdiction. Insofar as is pertinent here, this means the case must involve either a Federal question under 28 U.S.C. 1331, or the United States as a plaintiff or defendant (section 1345 and 1346, respectively). Removal is subject to numerous additional qualifications beyond the scope of this limited discussion, but it may be noted that under section 1441(c), where a case involves claims which are not removable, the claim upon which removal is sought must be separate and independent from those which may not be removed.

¹Although removal of cases where a Federal official is named as a defendant is authorized by another provision (28 U.S.C. 1442(a)), this provision has been strictly construed not to include government agencies. Western Securities Co. V. Derwinski, 937 F. 2d 1276, (7th Cir., 1991), at 1279.

III. The impact of the Seventh Circuit decision in Blackburn v. Sundstrand.

The controversy in the Blackburn case originated in an auto accident. Mr. and Mrs. Blackburn sued the driver in Illinois state court, and ultimately settled their damages claim for \$105,000. While the litigation was pending, the Blackburns received over \$25,000 in medical insurance payments under a health benefits plan provided by Sundstrand which was drafted in accordance with the requirements of ERISA. After the Blackburns settled their injury suit, Sundstrand demanded reimbursement of the medical insurance payments under a subrogation clause of the health benefits plan. Mr. and Mrs. Blackburn then filed a petition in Illinois state court to apportion the \$105,000 so that a portion of their attorney's fees and expenses might be deducted from the amount of medical benefit payments, thereby reducing Sundstrand's recovery to approximately \$17,000. Sundstrand then obtained removal of the action in Illinois state court to the Federal District Court for the Northern District of Illinois, on grounds that as the subrogation clause was part of a plan drawn under ERISA, and as ERISA preempted state law with respect to covered plans, the Blackburns could not reduce a payment due Sundstrand under the plan by application of Illinois law. The District Court ruled against the Blackburns' claim for an attorney's fee set off. The Court held that applying Illinois law to reduce Sundstrand's recovery would interfere with the plan's operation, and thus conflict with the objectives of ERISA. Blackburn v. Becker, 933 F. Supp. 724 (1996), at 728.

On appeal, however, the Seventh Circuit reversed the District Court. Primarily, the Court of Appeals found that the District Court lacked jurisdiction over the case in the first instance because the case removed (Blackburn v. Becker) was merely a tort suit under state, rather than Federal, law. 115 F. 3d at 494, citing 28 U.S.C. 1441(b). Moreover, the Court stated that Sundstrand's ERISA preemption argument itself was at best a Federal defense to a claim under state law, and a Federal defense does not create removal jurisdiction. Id. at 495. In reaching this conclusion, the Seventh Circuit also resolved a conflict with the Illinois Court system, as the Illinois Supreme Court had previously determined that ERISA did not preempt the common fund doctrine. Scholtens v. Schneider, 671 N.E.2d 657 (Ill., 1996).

The position of Sundstrand in Blackburn is similar in some respects to the Board's position vis-a-vis the lien under section 12(o). In both instances, reimbursement for previous payments is claimed by a third party from a payment between parties to a tort suit. Also, in both instances, the reimbursement claim is made under color of a Federal statute. The fact that personal injury claims against which the Board may assert a 12(o) lien may be litigated against railroad employers under the Federal Employers' Liability Act rather than state law is not significant, as FELA suits once brought in state court may not be removed. 28 U.S.C. 1445(a).

However, unlike Sundstrand Corporation, the Board is an agency of the Federal government. Sundstrand was constrained to establish a Federal question under 28 U.S.C. 1331 to show that the District Court could have exercised original jurisdiction for purposes of removal under section 1441. If the Board were to seek an adjudication of a 12(o) lien in Federal court, it would be in

the form of a claim for money due the United States. Aside from Federal question as a basis of original District Court jurisdiction, the Board may potentially show another ground for jurisdiction as a Federal plaintiff. See U.S. v. State of Illinois, 454 F. 2d 297, 301, (7th Cir., 1971), (U.S. indemnity claim as third party plaintiff establishes district court jurisdiction under 28 U.S.C. 1345)². The question of preemption of state law by a Federal statute as a basis for District Court jurisdiction need not arise.

Even considering removal jurisdiction based upon a Federal question, Blackburn is distinguishable on several counts. Most obviously, Blackburn involved ERISA rather than the RUIA. As noted above, such case law as currently exists under 12(o) supports the Board's traditional position that it is not required by state equity law to allow a portion of the claimant's attorney's fees to be deducted from the amount otherwise recoverable under section 12(o).

Blackburn not only involved another statute; it did so more tangentially than a claim by the Board under 12(o). To construct a Federal issue, Sundstrand was forced to look past the subrogation provision of its plan to the Federal statute which provided the general drafting criteria for the plan. Yet, ERISA did not address subrogation, and as the Seventh Circuit observed, "Illinois's common-fund doctrine * * * is not about employee benefit plans." 115 F. 3d at 495. Different subject matter meant no Federal preemption. In contrast, the Board's claim arises directly under section 12(o). By establishing a lien for the amount of benefits paid, section 12(o) preempts state law which would interfere with that recovery. There is no need to hypothesize whether payment of attorney's fees would conflict with some general purpose of Congress in establishing a law governing another field.

Finally, unlike Blackburn, which involved private funds, applying the common fund theory to the Board results in payment of a private party's attorney fee from the public fisc. Such charges cannot be made without Congressional authorization. Richter, supra.

²Although it has been held that the mere presence of the United States as a defendant is not a basis for removal (see e.g. Eastern Indemnity Co. v. J.D. Conti Electric Co., 573 F.Supp. 1036 (U.S.D.C, E.D. Va., 1983),1039) existence of an independent Federal claim under 12(o) may avoid this difficulty.

In view of the foregoing, it is my opinion that the Board is not barred by the decision in Blackburn v. Sundstrand from removing a case from state to Federal court in order to enforce its claim for a lien under section 12(o) of the Railroad Unemployment Insurance Act.